STATE OF MICHIGAN

COURT OF APPEALS

THOMAS J. MUTTON,

Plaintiff-Appellee,

v

RAYMOND G. REIFF and R. BRUCE McCLELLAND,

Defendants-Appellants.

UNPUBLISHED
June 6, 1997

No. 193412
Oakland Circuit Court
LC No. 95-497404-CK

Before: Saad, P.J., and Neff and Jansen, JJ.

PER CURIAM.

Defendants appeals as of right from the trial court's order granting summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff and defendants owned a business which was bought by Miller & Company (Miller). Plaintiff executed an employment contract with Miller which provided that unless Miller terminated plaintiff without good cause, plaintiff would be prohibited from competing with Miller during the two-year period immediately following the termination of his employment. Plaintiff then executed a contract with each defendant whereby each defendant agreed to pay plaintiff $75,000 over a two-year period if plaintiff's employment with Miller terminated on or before March 1, 1995, and plaintiff was prohibited from competing with Miller for the following two years. Plaintiff resigned from Miller on March 1, 1995, and was prohibited from competing with Miller for the following two-years, but sought and gained employment in an unrelated field. Defendants refused to pay plaintiff, and plaintiff filed this suit.

This case concerns the interpretation of several contractual provisions. The trial court found that the language was clear and unambiguous and that plaintiff was entitled to $75,000 under the terms of the contract. The trial court, therefore, granted summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(10). We review the trial court's decision on a motion for summary disposition de novo. *Miller v Farm Bureau Mutual Ins Co*, 218 Mich App 221, 233; 553 NW2d 371 (1996). In reviewing a motion under MCR 2.116(C)(10), a court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the

nonmoving party, granting the nonmoving party the benefit of any reasonable doubt. *Id.* Summary disposition under MCR 2.116(C)(10) is appropriate when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiff's employment contract with Miller contained the following provisions:

> The initial term of this Agreement and [Plaintiff's] employment hereunder (the "Initial Term") shall commence as of . . . [March 2, 1992] and continue thereafter, unless sooner terminated as hereinafter provided, until the third anniversary of the Effective Date. Unless notice of an election not to renew this Agreement is given in writing by either party to the other no later than ninety (90) days prior to the expiration of the Initial Term or any Renewal Term, this Agreement automatically shall be renewed for an additional one-year term, (a "Renewal Term") upon expiration of the term then in force.
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> As used herein, the term "Non-competition Period" shall mean the term of [Plaintiff's] employment hereunder plus the twenty-four (24) months immediately following the effective date of any termination of [Plaintiff's] employment. Notwithstanding the foregoing, if Company elects not to renew this agreement by giving written notice pursuant to paragraph 3(a) above, and assuming no good cause (as defined above) for termination exists, the term "Non-competition Period" shall mean the term of [Plaintiff's] employment hereunder.

Further, defendants each executed an agreement with plaintiff which contained the following:

> If, but only if, pursuant to the terms of [Plaintiff's] Agreement with Miller, his employment with Miller terminates at the end of the original three year employment term (through March 1, 1995), or prior thereto, under such circumstances that he is prohibited from competing with Miller for a two year period commencing no later than March 2, 1995, and ending no later than March 1, 1997, prescribed under paragraph 7 of [Plaintiff's] Agreement with Miller, [Defendant] will pay to [Plaintiff] no later than March 1, 1995 the sum of Thirty Seven Thousand Five Hundred ($37,500.00) for the first year of the two year prescribed period of non-competition, and shall pay to [Plaintiff] no later than March 1, 1996 an additional Thirty Seven Thousand Five Hundred ($37,500.00) Dollars for the second year of the two year prescribed period of non-competition.
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> Anything herein to the contrary notwithstanding, [Defendant] shall not be obligated to make either of the lump sum payments provided for hereunder, if prior to the commencement of the non-compete period there has been any modification of

> [Plaintiff's] Agreement with Miller, which directly or indirectly affects [Plaintiff's] post-employment non-competition with Miller, unless consent to such modification is obtained from [Defendant].

Under the above-cited contractual terms, three circumstances must have existed in order for defendants' obligation to plaintiff. First, plaintiff's employment must have terminated on or before March 1, 1995. Second, plaintiff must have been prohibited from competing with Miller for a two-year period commencing not later than March 2, 1995, and ending no later than March 1, 1997. Finally, plaintiff and Miller must not have made any modification to plaintiff's employment agreement which directly or indirectly affected plaintiff's post-employment non-competition obligation.

Where contractual language is clear, its construction is a question of law for the court. *G&A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition would be inappropriate. *Meagher v Wayne State Univ*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 177139, 183282, issued April 15, 1997), slip op, p 10. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. *Id.* The language of a contract should be given its ordinary and plain meaning. *Id.* Parol evidence is not admissible to change a contract that is clear and unambiguous, but may be admissible to prove the existence of any ambiguity and to clarify the meaning of an ambiguous contract. *Id.*

Plaintiff's employment with Miller commenced for an initial term of three years, ending March 1, 1995. It is undisputed that plaintiff's employment with Miller terminated on March 1, 1995, without written notice, but by mutual agreement. Defendants urge us to find a requirement that defendants were obligated to pay plaintiff only if plaintiff was involuntarily terminated. We decline to do so because no such requirement is discernible from the clear and unambiguous terms of the contracts. Defendants' obligations arise if plaintiff's employment with Miller, "terminates at the end of the original three year employment term, or prior thereto." It is undisputed that that circumstance arose. We will not rewrite the parties' contracts to include a requirement of involuntary termination.

It is also undisputed that plaintiff was prohibited from competing with Miller for a two-year period commencing March 2, 1995, and ending March 1, 1997. Plaintiff's employment contract provided that plaintiff would only be released from his two-year post-employment obligation not to compete with Miller if Miller elected not to renew plaintiff's employment contract without good cause. However, plaintiff and Miller reached a mutual agreement not to renew the contract. Therefore, plaintiff remained obligated not to compete with Miller for two years following the end of his employment with Miller. Miller sent a letter to plaintiff confirming termination of plaintiff's employment and plaintiff's obligation not to compete with Miller for two years, commencing March 2, 1995.

Defendants argue that plaintiff was not actually prohibited from competing with Miller following his employment there because plaintiff specifically sought to leave the business in which Miller competed, and because plaintiff gained employment in an unrelated field. We do not agree. The question of whether plaintiff desired to compete with Miller is irrelevant to the question of whether

plaintiff was prohibited from doing so. There is no clause in defendants' contracts with plaintiff providing that defendants would not be obligated to pay plaintiff if plaintiff gained employment in an unrelated field during the two years for which he was prohibited from competing with Miller. We cannot add such a clause to the parties' contracts. The contracts clearly indicate that plaintiff was prohibited from competing with Miller for the two-year period commencing March 2, 1995, and ending March 1, 1997.

Finally, plaintiff's and Miller's agreement to waive the ninety-day written notice requirement was not a modification that directly or indirectly affected plaintiff's post-employment non-competition obligation. We agree with defendants that the waiver was a modification to the original contract. However, the waiver did not affect plaintiff's obligation not to compete. Defendants argue that because neither plaintiff nor Miller gave written notice not to renew the contract by December 1, 1994, the contract automatically renewed itself and plaintiff's employment was extended until March 1, 1996. Therefore, defendants argue, plaintiff breached his agreement with Miller when he untimely resigned, which directly affected his post-employment non-compete obligation because had plaintiff not breached his contract with Miller, plaintiff would have been employed with Miller after March 1, 1995, and defendants' obligation to pay would have been extinguished.

We disagree with defendants' argument. Plaintiff's and Miller's waiver of the ninety-day notice provision simply did not directly or indirectly affect plaintiff's post-employment non-competition obligation. The language of the contracts is clear and unambiguous. Defendants each agreed to pay plaintiff $75,000 over a two-year period if plaintiff's employment with Miller terminated on or before March 1, 1995, and plaintiff was prohibited from competing with Miller for the following two years. Plaintiff's employment with Miller did terminate on March 1, 1995, and plaintiff was prohibited from competing with Miller until March 1, 1997.

Defendants also argue that the trial court erred when it refused to apply the doctrine of mitigation. Defendants argue that plaintiff has no actual damages because he mitigated his damages when he found employment which compensated him at a rate more than $75,000 per year. However, the doctrine of mitigation of damages is not applicable in this case. Plaintiff is not required to show proof of actual damages suffered as a consequence of defendants' non-payment because the damage sum was provided in a valid contract stipulation. *Geiger v Cawley*, 146 Mich 550, 554; 109 NW 1064 (1906).

Affirmed.

/s/ Henry William Saad
/s/ Janet T. Neff
/s/ Kathleen Jansen